Mega First Marketing Sdn Bhd & Anor v OCBC Al-Amin Bank Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22M-254–06 OF 2020
ATAN MUSTAFFA JC
10 MARCH 2020

Banking — Banks and banking business — Banking facility — Islamic financing — Agreements relating to financing facility given by defendant to first plaintiff entered between plaintiffs and defendant — Whether agreements and facility granted were void for being non-Shariah compliant — Whether late payment charge (ta'widh) imposed by defendant was in compliance with guidelines issued by Bank Negara Malaysia — Whether Ibra' (rebate) need to be granted to first plaintiff — Whether terms of agreements and letter of guarantee were not properly explained to plaintiffs — Whether first plaintiffs still owner of commodity and defendant shall hold proceeds from sale of commodity on constructive trust for first plaintiff

Civil Procedure — Striking out — Application for — Agreements relating to financing facility given by defendant to first plaintiff entered between plaintiffs and defendant — Defendant obtained judgment and summary judgment against plaintiffs — Plaintiffs filed action for declaration that agreements entered between plaintiffs and defendant were null and void — Defendant applied to strike out plaintiffs' action — Whether res judicata applied — Whether judgment wrongly, dishonestly and/or fraudulently obtained by defendant — Rules of Court 2012 O 18 r 19(1)

This was the defendant's application ('encl 8') against the plaintiffs to strike out a writ action pursuant to O 18 r 19(1) of the Rules of Court 2012 ('the ROC 2012') by the plaintiffs against the defendant for a declaration that agreements entered between the plaintiffs and the defendant relating to a financing facility given by the defendant to the first plaintiff were null and void and for other related reliefs. The defendant granted to the first plaintiff an Islamic financing facility of RM300,000 under the Shariah principle of Commodity Murabahah Term Financing-i ('the CM-i Facility') pursuant to a letter of offer ('the letter of offer'). This was further documented by an asset sale agreement ('the asset sale agreement') together with the Al-Amin Product terms ('the Al-Amin Product Terms') executed between the defendant and the first plaintiff ('the agreements'). The repayment of the CM-i Facility was secured by, inter alia, a letter of guarantee ('the letter of guarantee') executed by the second plaintiff, one Ng Ah Kheong ('Ng') and one Lau Swee Boon ('Lau') wherein they jointly

and severally covenanted to, inter alia, pay the defendant on demand all monies due and owing by the first plaintiff to the defendant under the CM-i Facility and all costs and expenses incurred by the defendant in enforcing the provisions thereof. The defendant, upon the first plaintiff's promise or agreement to purchase the underlying commodity from the defendant, purchased the commodity ('the commodity') from the market through the BURSA Suq Al-Sila' at costs of RM300,000. The defendant then sold the commodity at costs plus profit to the first plaintiff at the defendant's sale price of RM405,000 which was payable on deferred payment terms. Then, the defendant as an agent of the first plaintiff sold the commodity on the first plaintiff's behalf in the market through the BURSA Suq Al-Sila' at the customer's (the first plaintiff) sale price of RM300,000 on cash terms. The first plaintiff defaulted in making payments to the defendant on due dates and the defendant issued letters to the plaintiffs, Ng and Lau demanding for payment of the sums due and owing to the defendant under the CM-i Facility for the sum of RM159,192.84. Despite the defendant's demands, the payment from the plaintiffs, Ng and Lau was not forthcoming. The defendant then terminated the CM-i Facility and initiated legal proceedings ('the sessions court suit') against the plaintiffs, Ng and Lau for the recovery of the amounts owing and payable thereunder. The plaintiffs entered their appearance but filed their defence outside of the prescribed time. The defendant then filed an application under O 18 r 19 of the ROC 2012 ('the sessions court O 18 application') to strike out the defence of the plaintiffs in the sessions court suit on the ground that it was filed two weeks late. The sessions court allowed the defendant's application and the defendant obtained a judgment ('the judgment') against the plaintiffs for a sum of RM159,192.84 due with a late payment charge (*ta'widh*) at 1%pa on the outstanding balance until one day before date of judgment and thereafter at the Islamic Interbank Money Market ('IIMM') rate on the judgment sum from the date of judgment to the date of full settlement thereof. Also, the defendant obtained another judgment ('the summary judgment') against Ng and Lau pursuant to the defendant's application under O 14 of the ROC 2012 for a sum of RM132,838.70 ('the O 14 application'). No application to set aside the judgment was made by the plaintiffs and no appeal was lodged by Ng and Lau against the summary judgment. The plaintiffs, Ng and Lau did not make any payment of the sums recorded under the judgment or the summary judgment or any part thereof to the defendant. The plaintiffs filed this action praying inter alia for the following: (a) a declaration that the letter of offer, the asset sale agreement, master facility agreement, letter of guarantee and all agreements between the plaintiffs and the defendant were void and not enforceable against the plaintiffs; (b) a declaration that the defendant was holding the proceeds of sale of the commodity on constructive trust on behalf of the first plaintiff; (c) an order that the defendant to pay the first plaintiff an amount equivalent to the value of the crude palm oil; and (d) the order and the judgment given in the sessions court suit be set aside against the plaintiffs. Hence, this application by

the defendant in encl 8 for the plaintiffs' writ and statement of claim to be struck out. A

Held, allowing encl 8 with costs of RM5,000:

(1) The plaintiffs' claim founded on the basis that the CM-i Facility and the letter of guarantee being invalid and void for being in contravention of Shariah principles and guidelines of Bank Negara Malaysia (which were reflective of Shariah principles) was wholly unsustainable. Non-compliance with Shariah principles did not render a financing facility contract illegal and unenforceable unless it was vitiated by the vitiating factors as stipulated in s 24 of the Contracts Act 1950. The courts had consistently taken a disapproving view of customers of Islamic based facilities who had benefited from the facilities taken and then avoid their payment obligations by raising the issue that the Islamic financing facilities granted were non-Shariah compliant, as the plaintiffs were doing in the present case (see paras 31 & 33). B C D

(2) The late payment charge (*ta'widh*) at 1%pa on all overdue instalments before the maturity and at the IIMM rate on the outstanding balance after the maturity of the CM-i Facility imposed by the defendant was in compliance with Bank Negara Malaysia's Guidelines on Late Payment Charges for Islamic Financial Institutions ('the guidelines'). The plaintiffs' action against the defendant on the basis that the late payment charge (*ta'widh*) imposed by the defendant was in conflict with the guidelines issued by Bank Negara Malaysia was therefore unsustainable (see paras 35–36). E F

(3) The plaintiffs' contention that they suffered loss due to the negligence and/or failure of the defendant in failing to apply *Ibra*' (rebate) upon termination of the CM-i Facility was without basis as it was clearly stated in the letter of offer executed between the defendant and the first plaintiff that *Ibra*' shall only be granted if the first plaintiff settled or terminated the facility before the end of financing tenure by way of full settlement of the amount due and owing under the facility, which was not the case here. A financier bank had no obligation to give *Ibra*' where there was no early settlement of the financing. Therefore, the plaintiffs' case that they suffered due to the negligence or failure of the defendant in failing to apply *Ibra*' upon termination of the CM-i Facility was in law plainly unsustainable (see paras 38–39 & 43). G H

(4) The contention of the plaintiffs that the agreements were not properly explained to them ran contrary to what was agreed to by the plaintiffs in the agreements. Further, the sum of RM300,000 disbursed under the facility was fully utilised by the first plaintiff was never disputed. When part-payments in the total sum of RM282,780.05 were made by the first plaintiff, the plaintiffs did not dispute the validity of the agreements or I

raise any complaint or protest that the agreements were allegedly non-Shariah compliant. The plaintiffs clearly understood the terms of the agreements and had voluntarily agreed to be bound it. Therefore, the plaintiffs' cause of action in misrepresentation and fraud founded on the contention that the agreements and the letter of guarantee were not properly explained to the plaintiffs was bound to fail (see paras 45 & 47–48).

(5) Judicial estoppel operated against the plaintiffs in respect of the plaintiffs' action for the order declaring that the letter of offer, asset sale agreement and letter of guarantee and all agreements between the plaintiffs and the defendant were invalid and void and shall not be enforceable against the plaintiffs. There was no explanation offered in the plaintiffs' affidavit on their failure to raise these issues in the sessions court suit. The plaintiffs were raising the same issues which would have and should have been ventilated in the sessions court suit and by raising the same issues before this court, the plaintiffs were attempting to relitigate and amplify the issues again. Such an attempt was an abuse of the process of the court. The plaintiffs' action for the order as prayed must be struck out (see paras 49, 51 & 53).

(6) Although it was averred in the plaintiffs' affidavit in reply that their solicitor on their behalf issued a letter to the defendant requesting for particulars of the commodity, no such letter was exhibited by the plaintiffs. The basis of the plaintiffs' contention was misconceived and without merit. Any allegation that the commodity was sold to a third party without the consent of the first plaintiff, which formed the basis of the plaintiffs' further contention that the price of the commodity was never reported and not paid to the plaintiffs and not credited back into the first plaintiff's account amounting to fraudulent actions or stealing by the defendant was without merit. The appointment of the defendant as the first plaintiff's agent to sell the commodity in the market at the customer's sale price on cash terms to execute all transactions for and behalf of the customer was to facilitate the transaction so as to be compliant with the Shariah requirements of the commodity Murabahah transaction. The plaintiffs' case on the basis that the first plaintiff was still the owner of the commodity transacted under the shariah principle of commodity Murabahah and that the defendant shall hold the proceeds from the sale of the commodity on constructive trust for the first plaintiff was baseless and was bound to fail. The plaintiffs' action for the orders ought to be struck off for being scandalous, frivolous and vexatious (see paras 57–58, 60 & 63).

(7) The plaintiffs' case based on the contention that the sessions court judgment was wrongly, dishonestly and/or fraudulently obtained by the defendant to be baseless and consequently the plaintiffs' action for the

judgment to be set aside is bound to fail. Based on what had transpired in the proceedings in the sessions court suit there was no confusion and/or intention to conceal any information as otherwise alleged by the plaintiffs. Further, the plaintiffs had failed to file any appeal against the sessions court judgment. Thus, they were estopped from relitigating any matter connected therewith by filing this action. The plaintiffs' action for the judgement in the sessions court suit to be struck off and set aside against the plaintiffs in these proceedings rather than apply to set aside the sessions court judgement in the sessions court was barred by res judicata and was a patent abuse of the process of the court which ought to be struck out (see paras 65–66 & 71–72).

[Bahasa Malaysia summary

Ini adalah permohonan defendan ('lampiran 8') terhadap plaintif untuk membatalkan tindakan writ menurut A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') oleh plaintif terhadap defendan untuk perisytiharan bahawa perjanjian yang dimeterai antara plaintif dan defendan berkaitan dengan kemudahan pembiayaan yang diberikan oleh defendan kepada plaintif pertama adalah batal dan tidak sah dan untuk relif lain yang berkaitan. Defendan memberikan kepada plaintif pertama kemudahan pembiayaan Islam sebanyak RM300,000 berdasarkan prinsip Syariah Commodity Murabahah Term Financing-i ('Kemudahan CM-i') berdasarkan satu surat tawaran ('surat tawaran'). Ini didokumentasikan selanjutnya oleh perjanjian penjualan aset ('perjanjian penjualan aset') bersama dengan terma Produk Al-Amin ('Terma Produk Al-Amin') yang dilaksanakan antara defendan dan plaintif pertama ('perjanjian'). Pembayaran balik Kemudahan CM-i dijamin oleh, antara lain, satu surat jaminan ('surat jaminan') yang dilaksanakan oleh plaintif kedua, Ng Ah Kheong ('Ng') dan Lau Swee Boon ('Lau') di mana mereka secara bersama dan berasingan berjanji untuk, antara lain, membayar defendan atas permintaan semua wang yang harus dibayar dan ditanggung oleh plaintif pertama kepada defendan di bawah Kemudahan CM-i dan semua kos dan perbelanjaan yang ditanggung oleh defendan dalam menguatkuasakan peruntukannya. Defendan, atas janji atau perjanjian plaintif pertama untuk membeli komoditi asas daripada defendan, membeli komoditi ('komoditi') daripada pasaran melalui BURSA Suq Al-Sila' dengan harga RM300,000. Defendan kemudian menjual komoditi tersebut dengan kos ditambah keuntungan kepada plaintif pertama dengan harga penjualan defendan sebanyak RM405,000 yang perlu dibayar dengan terma pembayaran tertunda. Kemudian, defendan sebagai ejen plaintif pertama menjual komoditi tersebut atas nama plaintif pertama di pasaran melalui BURSA Suq Al-Sila' dengan harga jualan pelanggan (plaintif pertama) sebanyak RM300,000 secara tunai. Plaintif pertama gagal membuat pembayaran kepada defendan pada tarikh yang ditetapkan dan defendan mengeluarkan surat kepada plaintif, Ng dan Lau menuntut pembayaran sejumlah wang yang harus dibayar dan terhutang kepada defendan di bawah Kemudahan CM-i dengan jumlah

RM159,192.84. Walaupun dengan tuntutan defendan, pembayaran daripada plaintif, Ng dan Lau tidak dilakukan. Defendan kemudian menamatkan Kemudahan CM-i dan memulakan prosiding undang-undang ('saman mahkamah sesyen') terhadap plaintif, Ng dan Lau untuk mendapatkan kembali jumlah yang terhutang dan perlu dibayar di bawahnya. Plaintif memasukkan kehadiran mereka tetapi memfailkan pembelaan mereka di luar waktu yang ditentukan. Defendan kemudian memfailkan permohonan di bawah A 18 k 19 KKM 2012 ('permohonan A 18 mahkamah sesyen') untuk membatalkan pembelaan plaintif dalam saman mahkamah sesyen dengan alasan bahawa ia telah difailkan dua minggu lewat. Mahkamah sesyen membenarkan permohonan defendan dan defendan memperoleh satu penghakiman ('penghakiman") terhadap plaintif dengan jumlah RM159,192.84 yang perlu dibayar dengan caj pembayaran lewat (Ta'widh) pada kadar 1% setahun pada baki tertunggak sehingga satu hari sebelum tarikh penghakiman dan selepas itu di Pasaran Wang Antara Bank Secara Islam ('IIMM') kadar penghakiman berjumlah dari tarikh penghakiman hingga tarikh penyelesaian sepenuhnya. Tambahan lagi, defendan memperoleh satu lagi penghakiman ('penghakiman terus') terhadap Ng dan Lau berdasarkan permohonan defendan di bawah A 14 KKM 2012 dengan jumlah RM132,838.70 ('permohonan A 14'). Tidak ada permohonan untuk mengetepikan penghakiman yang dibuat oleh plaintif dan tidak ada rayuan yang diajukan oleh Ng dan Lau terhadap penghakiman terus tersebut. Plaintif, Ng dan Lau tidak membuat pembayaran jumlah yang tercatat di bawah penghakiman atau penghakiman terus atau bahagiannya kepada defendan. Plaintif memfailkan tindakan ini memohon antara lain untuk yang berikut: (a) perisytiharan bahawa surat tawaran, perjanjian penjualan aset, perjanjian kemudahan induk, surat jaminan dan semua perjanjian antara plaintif dan defendan adalah tidak sah dan tidak dapat dilaksanakan terhadap plaintif; (b) perisytiharan bahawa defendan memegang hasil penjualan komoditi atas kepercayaan konstruktif bagi pihak plaintif pertama; (c) perintah supaya defendan membayar plaintif pertama sejumlah yang setara dengan nilai minyak sawit mentah; dan (d) perintah dan penghakiman yang diberikan dalam saman mahkamah sesyen diketepikan terhadap plaintif. Oleh itu, permohonan ini oleh defendan dalam lampiran 8 untuk writ dan pernyataan tuntutan plaintif dibatalkan.

Diputuskan, membenarkan lampiran 8 dengan kos RM5,000:

(1) Tuntutan plaintif didasarkan pada asas bahawa Kemudahan CM-i dan surat jaminan tidak sah dan batal kerana melanggar prinsip dan garis panduan Syariah Bank Negara Malaysia (yang mencerminkan prinsip Syariah) sama sekali tidak dapat dipertahankan. Ketidakpatuhan dengan prinsip-prinsip Syariah tidak menjadikan kontrak kemudahan pembiayaan menjadi tidak sah dan tidak dapat dilaksanakan kecuali terbatal oleh faktor-faktor yang membatalkan seperti yang dinyatakan

dalam s 24 Akta Kontrak 1950. Mahkamah secara konsisten mengambil pandangan tidak setuju terhadap pelanggan kemudahan berasaskan Islam yang telah memanfaatkan kemudahan yang diambil dan kemudian menghindari kewajipan pembayaran mereka dengan membangkitkan isu bahawa kemudahan pembiayaan Islam yang diberikan tidak mematuhi Syariah, seperti yang dilakukan oleh plaintif di kes ini (lihat perenggan 31 & 33).

(2) Caj pembayaran lewat (*ta'widh*) pada kadar 1% setahun untuk semua ansuran tertunggak sebelum tempoh matang dan pada kadar IIMM pada baki tertunggak setelah tempoh Kemudahan CM-i yang dikenakan oleh defendan mematuhi Garis Panduan Bank Negara Malaysia mengenai Caj Lewat Bayaran untuk Institusi Kewangan Islam ('garis panduan'). Tindakan plaintif terhadap defendan dengan alasan bahawa caj pembayaran lewat (Ta'widh) yang dikenakan oleh defendan bertentangan dengan garis panduan yang dikeluarkan oleh Bank Negara Malaysia oleh itu tidak dapat dipertahankan (lihat perenggan 35–36).

(3) Pendapat plaintif bahawa mereka mengalami kerugian kerana kecuaian dan/atau kegagalan defendan gagal menerapkan *Ibra*' (rebat) setelah penamatan Kemudahan CM-i adalah tanpa asas seperti yang dinyatakan dengan jelas dalam surat tawaran yang dilaksanakan antara defendan dan plaintif pertama bahawa *Ibra*' hanya akan diberikan sekiranya plaintif pertama menyelesaikan atau menamatkan kemudahan tersebut sebelum berakhirnya tempoh pembiayaan dengan menyelesaikan sepenuhnya jumlah yang perlu dibayar dan terhutang di bawah kemudahan itu, yang tidak berlaku di sini. Bank pembiaya tidak berkewajiban untuk memberikan *Ibra*'di mana tidak ada penyelesaian awal pembiayaan. Oleh itu, kes plaintif bahawa mereka alami kerana kecuaian atau kegagalan defendan gagal menerapkan *Ibra*' setelah penamatan Kemudahan CM-i secara undang-undang jelas tidak dapat dipertahankan (lihat perenggan 38–39 & 43).

(4) Pendapat plaintif bahawa perjanjian tersebut tidak dijelaskan dengan tepat kepada mereka bertentangan dengan apa yang dipersetujui oleh plaintif dalam perjanjian tersebut. Selanjutnya, sejumlah RM300,000 yang dikeluarkan di bawah kemudahan tersebut telah digunakan sepenuhnya oleh plaintif pertama tidak pernah dipertikaikan. Ketika pembayaran sebahagian dari jumlah keseluruhan sebanyak RM282,780.05 dilakukan oleh plaintif pertama, plaintif tidak mempertikaikan kesahihan perjanjian tersebut atau mengemukakan sebarang aduan atau bantahan bahawa perjanjian tersebut didakwa tidak mematuhi Syariah. Plaintif memahami dengan jelas terma perjanjian dan secara sukarela bersetuju untuk terikat padanya. Oleh itu, kausa tindakan plaintif dalam salah nyata dan penipuan didasarkan pada pendapat bahawa perjanjian dan surat jaminan tidak dijelaskan dengan tepat

kepada plaintif adalah gagal (lihat perenggan 45 & 47–48).

(5) Estoppel kehakiman terpakai terhadap plaintif berkenaan dengan tindakan plaintif atas perintah yang menyatakan bahawa surat tawaran, perjanjian penjualan aset dan surat jaminan dan semua perjanjian antara plaintif dan defendan tidak sah dan batal dan tidak boleh dilaksanakan terhadap plaintif. Tidak ada penjelasan yang ditawarkan dalam afidavit plaintif mengenai kegagalan mereka membangkitkan isu-isu ini dalam saman mahkamah sesyen. Plaintif mengemukakan isu yang sama dengan yang seharusnya dikemukakan dalam saman mahkamah sesyen dan dengan membangkitkan masalah yang sama di hadapan mahkamah ini, plaintif berusaha untuk membicarakan semula dan membangkitkan lagi isu tersebut. Percubaan seperti itu adalah penyalahgunaan proses mahkamah. Tindakan plaintif untuk perintah tersebut seperti yang dipohon mesti dibatalkan (lihat perenggan 49, 51 & 53).

(6) Walaupun disahkan dalam afidavit balasan plaintif bahawa peguam mereka atas nama mereka mengeluarkan surat kepada defendan yang meminta butir-butir mengenai komoditi tersebut, tidak ada surat yang ditunjukkan oleh plaintif. Asas pertentangan plaintif adalah salah anggap dan tanpa merit. Segala tuduhan bahawa komoditi itu dijual kepada pihak ketiga tanpa persetujuan plaintif pertama, yang menjadi asas kepada pertentangan plaintif bahawa harga komoditi tersebut tidak pernah dilaporkan dan tidak dibayar kepada plaintif dan tidak dikreditkan kembali ke akaun plaintif pertama berjumlah tindakan penipuan atau mencuri oleh defendan adalah tanpa merit. Pelantikan defendan sebagai ejen plaintif pertama yang menjual komoditi tersebut di pasaran dengan harga jualan pelanggan dengan terma tunai untuk melaksanakan semua transaksi untuk dan bagi pihak pelanggan adalah untuk memudahkan transaksi tersebut agar sesuai dengan kehendak Syariah urus niaga komoditi Murabahah. Kes plaintif dengan alasan bahawa plaintif pertama masih merupakan pemilik komoditi yang diperdagangkan di bawah prinsip syariah komoditi Murabahah dan bahawa defendan akan memegang hasil penjualan komoditi tersebut atas kepercayaan konstruktif bagi plaintif pertama adalah tidak berasas dan gagal. Tindakan plaintif untuk perintah tersebut harus dibatalkan kerana mengaibkan, remeh dan menyusahkan (lihat perenggan 57–58, 60 & 63).

(7) Kes plaintif berdasarkan pendapat bahawa penghakiman mahkamah sesyen diperolehi secara salah, tidak jujur dan/atau penipuan oleh defendan adalah tidak berasas dan akibatnya tindakan plaintif agar keputusan tersebut diketepikan adalah gagal. Berdasarkan apa yang telah terjadi dalam prosiding saman mahkamah sesyen tidak ada kekeliruan dan/atau niat untuk menyembunyikan maklumat sebagaimana yang dituduh oleh plaintif. Selanjutnya, plaintif gagal memfailkan rayuan

terhadap penghakiman mahkamah sesyen. Oleh itu, mereka diestop daripada membicarakan semula perkara yang berkaitan dengannya dengan memfailkan tindakan ini. Tindakan plaintif agar penghakiman di mahkamah sesyen dibatalkan dan diketepikan terhadap plaintif dalam prosiding ini daripada memohon untuk mengetepikan penghakiman mahkamah sesyen di mahkamah sesyen dilarang oleh res judicata dan merupakan penyalahgunaan ketara terhadap proses mahkamah yang seharusnya dibatalkan (lihat perenggan 65–66 & 71–72).]

Cases referred to

Ann Joo Steel Berhad v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal [2019] MLJU 843, FC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (folld)

Bank Islam Malaysia Bhd lwn Rhea Zadani Corp Sdn Bhd dan lain-lain [2012] 10 MLJ 484, HC (refd)

Bank Islam Malaysia Bhd v Azhar bin Osman and other cases [2010] 9 MLJ 192, HC (refd)

Bank Kerjasama Rakyat (M) Bhd v PSC Naval Dockyard Sdn Bhd [2007] MLJU 722; [2008] 1 CLJ 784, HC (refd)

CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor [2012] 3 MLJ 869; [2011] 7 CLJ 594, HC (refd)

Dato' Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd [1998] 3 MLJ 393; [1998] 3 CLJ 605, CA (refd)

Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd [1972] 1 MLJ 168 (refd)

High Commissioner for India and Others v Ghosh [1959] 3 WLR 811, CA (refd)

JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561, FC (refd)

Lua & Mansor (suing as a firm) v Tan Ah Kim [2017] 3 MLJ 371, CA (refd)

Maybank Islamic Bhd v Kamarulzaman bin Mohamed Nordin [2014] 7 MLJ 685, HC (refd)

Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor [2017] 2 MLJ 69, CA (refd)

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309, CA (refd)

Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal [1994] 2 MLJ 601, SC (refd)

A *Ram Thayalan Raman Siv & Anor v Liew Yap Tong t/a Tong Heng Motor Work* [2002] 4 SLR 566, HC (refd)
Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor [2007] 2 MLJ 221, CA (refd)
Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors [2012] 1 MLJ
B 473; [2012] 1 CLJ 75, CA (refd)
Small Medium Enterprise Development Bank Malaysia Berhad v Savvy Valley Sdn Bhd & Ors (Suit No WA-22M-621–12 of 2018) (unreported), HC (refd)
TSC Education Sdn Bhd v Kolej Yayasan Pelajaran Mara & Anor [2002] 5 MLJ
C 577, HC (refd)
Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit [2011] 3 MLJ 766; [2010] 4 CLJ 388, HC (refd)
Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals [2019] 1 MLJ
D 59; [2018] 9 CLJ 425, FC (refd)
Yeoh Theam Poh & Anor v Bench Win Sdn Bhd & Anor and other suits [2013] 8 MLJ 109, HC (refd)

Legislation referred to

E Central Bank of Malaysia Act 2009 ss 56, 57
Contracts Act 1950 s 24
Malay Reservations Enactment
Rules of Court 2012 O 14, O 15 r 2, O 18, O 18 r 19, O 18 r 19(1), (1)(b), (1)(c), (1)(d), O 33 r 3
F Rules of Court [SG] O 15 r 2

Beh Chee Wei (Lim Hui Mi with him) (Beh & Co) for the plaintiffs.
Lau Kee Sern (Lim Pey Tsyr with him) (Kee Sern, Siu & Huey) for the defendant.

G **Atan Mustaffa JC:**

[1] This judgment concerns the defendant's application ('encl 8') against the plaintiffs to strike out a writ action pursuant to O 18 r 19(1) of the Rules of Court 2012 ('the ROC 2012') by the plaintiffs against the defendant for a
H declaration that agreements entered between the plaintiffs and the defendant relating to a financing facility given by the defendant to the first plaintiff are null and void and for other related reliefs.

[2] At the hearing of this application I allowed the defendant's application
I with costs of RM5,000. This judgment contains the full grounds for my decision.

BRIEF FACTS

[3] The defendant granted to the first plaintiff an Islamic Financing facility of RM300,000 under the Shariah Principle of Commodity Murabahah Term Financing-i ('the CM-i facility') pursuant to a letter of offer dated 22 February 2016 ('the letter of offer'). This was further documented by an asset sale agreement dated 10 March 2016 ('the asset sale agreement') together with the Al-Amin product terms dated 24 February 2016 ('the Al-Amin product terms') executed between the defendant and the first plaintiff. The letter of offer, asset sale agreement and Al-Amin product terms are collectively referred to as 'the agreements'.

[4] The repayment of the CM-i facility was secured by, inter alia, a letter of guarantee dated 10 March 2016 ('the letter of guarantee') executed by the second plaintiff, one Ng Ah Kheong ('Ng') and one Lau Swee Boon ('Lau') wherein they jointly and severally covenanted to, inter alia, pay the defendant on demand all monies due and owing by the first plaintiff to the defendant under the CM-i facility and all costs and expenses incurred by the defendant in enforcing the provisions thereof.

[5] On 10 March 2016, the defendant, upon the first plaintiff's promise or agreement to purchase the underlying commodity from the defendant, purchased the commodity ('the commodity') from the market through the BURSA Suq Al-Sila' at costs of RM300,000. The defendant then sold the commodity at costs plus profit to the first plaintiff at the defendant's sale price of RM405,000 which was payable on deferred payment terms. Then, the defendant as an agent of the first plaintiff sold the commodity on the first plaintiff's behalf in the market through the BURSA Suq Al-Sila' at the customer's (the first plaintiff) sale price of RM300,000 on cash terms.

[6] The first plaintiff defaulted in making payments to the defendant on due dates and the defendant through its solicitors, Messrs Kington Tan Dzul issued letters dated 3 July 2019 to the plaintiffs, Ng and Lau demanding for payment of the sums due and owing to the defendant under the CM-i facility for the sum of RM159,192.84. Despite the defendant's demands, the payment from the plaintiffs, Ng and Lau was not forthcoming.

[7] The defendant then terminated the CM-i facility and on 22 July 2019 initiated legal proceedings under Kuala Lumpur Sessions Court Suit No WA-A52M-3694–07 of 2019 ('the sessions court suit') against the plaintiffs, Ng and Lau for the recovery of the amounts owing and payable thereunder. The plaintiffs, who were legally represented by Messrs M Raman & Associates, entered their appearance but filed their defence outside of the prescribed time. The defendant then filed an application under O 18 r 19 of the ROC 2012

('the sessions court O 18 application') on 21 October 2019 to strike out the defence of the plaintiffs in the sessions court suit (who were the first and fourth defendants in the sessions court suit) on the ground that it was filed two weeks late.

[8] No affidavit in reply was filed by the plaintiffs in the sessions court O 18 application and the sessions court allowed the defendant's application on 17 December 2019 and the defendant obtained a judgment ('the judgment') against the plaintiffs for a sum of RM159,192.84 due as at 30 June 2019 with a late payment charge (*ta'widh*) at 1%pa on the outstanding balance until one day before date of judgment and thereafter at the Islamic Interbank Money Market ('IIMM') rate on the judgment sum from the date of judgment to the date of full settlement thereof.

[9] Also on 17 December 2019, the defendant obtained another judgment ('the summary judgment') against Ng and Lau, who were represented by Messrs N Saraswathy Devi, pursuant to the defendant's application under O 14 of the ROC 2012 for a sum of RM132,838.70 ('the O 14 application'). On 26 February2020, the judgment and the summary judgment were served on the solicitors on record for the plaintiffs, Ng and Lau respectively. No application to set aside the judgment was made by the plaintiffs and no appeal was lodged by Ng and Lau against the summary judgment. The plaintiffs, Ng and Lau did not make any payment of the sums recorded under the judgment or the summary judgment or any part thereof to the defendant.

[10] According to the plaintiffs, their solicitor on their behalf issued a letter dated 27 May 2020 to the defendant requesting for particulars of the commodity but it was not replied to by the defendant.

[11] On 11 June 2020, the plaintiffs filed this action praying, inter alia, for the following:

(a) a declaration that the letter of offer, the asset sale agreement, master facility agreement, letter of guarantee and all agreements between the plaintiffs and the defendant are void and not enforceable against the plaintiffs (para 95(a) of the statement of claim);

(b) a declaration that the defendant is holding the proceeds of sale of the commodity under Certificate No CP010MAR2016–00043–000 or 517.58699 tonnes of crude palm oil on constructive trust on behalf of the first plaintiff (para 95(b) of the statement of claim);

(c) an order that the defendant within 14 days of the judgment herein to pay the first plaintiff an amount equivalent to the value of the said or

517.58699 tonnes of crude palm oil based on the closing day price set by the Malaysian Palm Oil Council on the day of the judgment (para 95(c) of the statement of claim); and

(d) that the order and the judgment given by the sessions court in Kuata Lumpur in the sessions court suit be set aside against the plaintiffs (para 95(d) of the statement of claim).

[12] On 10 September 2020, the defendant filed this application in encl 8 for the plaintiffs' writ and statement of claim to be struck out pursuant to O 18 r 19(b), (c) and (d) of the ROC 2012.

THE LAW ON STRIKING OUT PURSUANT TO O 18 R 19 OF THE RULES OF COURT 2012

[13] The rules on striking out pleadings is provided in O 18 r 19(1) of the ROC 2012 and which is reproduced below for convenience:

19 Striking out pleadings and endorsements (O 18 r 19)

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[14] The Federal Court in *Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals* [2019] 1 MLJ 59; [2018] 9 CLJ 425 has succinctly laid out the test for striking out pleadings, referring to the locus classicus *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7. Ramly Ali FCJ delivering the judgment of the court, stated as follows:

The tests for striking out application under O 18 r 19 of the ROC, as adopted by the Supreme Court in *Bandar Builders* are, inter alia, as follows:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[15] The Court of Appeal, in *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; [2012] 1 CLJ 75 adopted the well settled principle of striking out in the following passage:

> A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305 (FC)).

[16] In dealing with an application filed under O 18 r 19(1) of the ROC 2012, the court should consider, and even scrutinise the evidence to determine whether the action is bound to fail. The Court of Appeal in *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309 held that:

> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400. Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

THE DEFENDANT'S SUBMISSIONS

[17] The defendant submitted that the doctrine of res judicata applies in the present case and the plaintiffs' claim shall be struck out in limine as the defendant had initiated an action against the plaintiffs and the other guarantors under the sessions court suit and obtained the judgment against the plaintiffs for the amounts owing and payable under the CM-i facility and the plaintiffs failed to raise any of the allegations currently raised in the present suit in sessions court suit which the plaintiffs would have had the opportunity to raise but had failed to do so. The defendant referred to the cases of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (SC), for the

proposition that the doctrine of res judicata also applies to such facts and issues which might have been and which were not brought forward as described, though not actually decided by the court.

[18] The defendant identified the plaintiffs' allegations that could have been raised in the sessions court suit as follows:

(a) the agreements and the CM-i facility granted pursuant thereto were void for being non-Shariah compliant;

(b) the terms of the agreements and the letter of guarantee were not properly explained to the plaintiffs;

(c) the plaintiffs were misrepresented as to the terms of the agreements and the letter of guarantee;

(d) the first plaintiff is still the owner of the commodity transacted under the CM-i facility; and

(e) the defendant shall hold the proceeds from the sale of the commodity on constructive trust for the first plaintiff.

[19] The defendant submitted that the first plaintiff's contention that the first plaintiff is still the owner of the commodity and that the defendant shall hold the proceeds from the sale of the commodity on constructive trust for the first plaintiff is untenable in fact and in law as the buying an selling of the commodity was pursuant to the terms of the agreement to enable the transaction under the Shariah Principle of Commodity Murabahah.

[20] The defendant submitted that the plaintiffs' contention that the agreements and the CM-i facility granted were void for being non-Shariah compliant was untenable as the plaintiffs only made bare allegations that the agreements and the CM-i facility granted thereunder are non-Shariah compliant but failed to demonstrate and or adduce any evidence to substantiate these allegations.

[21] The defendant submitted that contrary to that alleged by the plaintiffs, the late payment charge (*ta'widh*) imposed by the defendant at 1%pa on all overdue instalments before the maturity and at the IIMM rate on the outstanding balance after the maturity of the CM-i facility had been imposed by the defendant was in compliance with the guidelines issued by Bank Negara Malaysia.

[22] In respect of *Ibra'* (rebate), the defendant submitted that *Ibra'* does not need to be granted to the first plaintiff on the defendant's sale price at the point of instituting the sessions court suit as it is stated in the agreements that *Ibra'*

shall only be granted if the first plaintiff settles or terminates the CM-i facility before the end of financing tenure by way of full settlement of the amount due and owing under the facility, which is not the case here.

[23] The defendant submitted that the judgment was not wrongly, dishonestly and/or fraudulently obtained by the defendant despite there being a difference between the sum claimed by the defendant of RM159,192.84 and the defendant's statement of account showed that the amount owing by the plaintiffs was only RM132,838.70 which was the judgment sum recorded against Ng and Lau in the summary judgment on 17 December 2019. According to the defendant, the difference was due to the amount being claimed by the defendant in the summary judgment being reduced to RM132,838.70 as at 10 October 2019 after taking into account the part payment received by the defendant on 19 August 2019 after the sessions court suit was filed on 22 July 2019.

[24] The defendant finally submitted that the plaintiffs' allegation that they were misrepresented or induced into executing the agreements and the defendant had failed to properly explain the terms of the agreements to them cannot be sustained. The defendant's contention is that the first plaintiff had warranted to the defendant in the agreements, inter alia, that the first plaintiff and the second plaintiff, has sought, obtained and relied upon its own independent legal advice in the execution of the agreements and the letter of guarantee respectively. In this respect, the defendant had granted the CM-i facility on the basis of and in full reliance upon such warranty and the defendant had accepted the letter of guarantee on the basis of and in full reliance upon such warranty.

THE PLAINTIFFS' SUBMISSIONS

[25] The plaintiffs submitted that the defendant has not proven that the principle of res judicata is applicable to estop the plaintiffs from filing this suit. The plaintiffs argued that the affidavits filed by the defendant do not show or prove that the causes of actions raised in this suit have already been raised, tried and decided on merits in the sessions court suit. Further, the plaintiffs argued that the principle of res judicata cannot be invoked in the present suit as the judgment obtained by the defendant during the sessions court suit was not determined on the causes of actions and issues on point as it was only a judgment obtained summarily under O 18 r 19 of the ROC 2012 without considering the merits of the case, without the appearance of the plaintiff's solicitors and also without any defence from the plaintiffs.

[26] It was the plaintiffs' submission that they were not obliged to raise their causes of actions in this suit here as a counterclaim in the sessions court suit.

The plaintiffs argued that pursuant to O 15 r 2 of the ROC 2012 and the Singapore case of *Ram Thayalan Raman Siv & Anor v Liew Yap Tong t/a Tong Heng Motor Work* [2002] 4 SLR 566 (deciding on the in pari materia O 15 r 2 of the Singapore Rules), a counterclaim is a separate action and a defendant is not compelled to make his claim by way of a counterclaim.

[27] The plaintiffs further submitted that the causes of action and the reliefs claimed in this action are unconnected to the principal claim of the defendant in the sessions court suit, relying on *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168 and the English Court of Appeal decision in *High Commissioner for India and Others v Ghosh* [1959] 3 WLR 811.

[28] The plaintiffs submitted that this court has the inherent power to set aside the judgment as the plaintiffs have raised the issues that the judgment obtained in the sessions court suit was by way of dishonesty or fraud and the amount stated in the judgment was wrong. For the proposition that this court has the inherent power to set aside the judgment obtained by the defendant in the sessions court, the plaintiffs relied on *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC); *Ann Joo Steel Berhad v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2019] MLJU 843 (FC); *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601 (SC) and *Lua & Mansor (suing as a firm) v Tan Ah Kim* [2017] 3 MLJ 371 (CA).

[29] The plaintiffs also attempted to make a case that the sessions court's decision to allow the judgment to be entered is contrary to law, illegal and lacking of jurisdiction as the sessions court failed to refer to ss 56–57 of the Central Bank of Malaysia Act 2009 ('the CBMA 2009') when making the decision. The plaintiffs referred to s 56 of the CBMA 2009 which provides where in any proceedings relating to Islamic financial business before any court, any question which arises concerning a Shariah matter be referred by the court to the Bank Negara Malaysia Shariah Advisory Council ('SAC') for its ruling. Pursuant to s 57 of the CBMA 2009, the ruling made by the SAC pursuant to such a reference shall be binding on the Islamic financial institution. The plaintiffs further argued that the sessions court ought not have granted the judgment against the plaintiffs, without first referring the Shariah questions arising to the SAC relying on the Federal Court decision in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561.

A ANALYSIS AND FINDINGS

Shariah compliance of the agreements and the CM-i facility

B **[30]** The plaintiffs pleaded in the statement of claim that the agreements documenting the CM-i facility and the letter of guarantee are invalid and void for being in contravention of Shariah principles and guidelines of Bank Negara Malaysia (see para 37 of the statement of claim). In summary, the following was stated as the basis of the Shariah non-compliance in para 26 of the plaintiffs' affidavit in reply:

C

(a) the profit rate of 7%pa imposed on the first plaintiff is interest in disguise, contrary to the fundamental principle of Islamic banking;

(b) the defendant's selling price is contrary to the fundamental principle of Islamic banking;

D

(c) in item 2(d) of the letter of offer the defendant imposes a late payment charge of 1%pa which is contrary to the guidelines of Bank Negara Malaysia;

E

(d) pursuant to the guidelines of Bank Negara Malaysia an Islamic banking institution can only impose *ta'widh* on the basis of compensation based on the actual losses incurred by the Islamic banking institution which cannot exceed 1% per year;

(e) the letter of guarantee states that the guarantee is in consideration of the defendant giving a loan to the first plaintiff based on Shariah principles;

F

(f) the letter of guarantee does not comply with the conditions and guidelines of Bank Negara Malaysia and is also not based on the principles of Shariah or Kafalah; and

G

(g) the letter of guarantee is a conventional letter of guarantee of a conventional guarantee and a format of guarantee for a conventional loan and not having Shariah or Kafalah features.

H **[31]** It is the court's finding that the plaintiffs' claim founded on the basis that the CM-i facility and the letter of guarantee being invalid and void for being in contravention of Shariah principles and guidelines of Bank Negara Malaysia (which are reflective of Shariah principles) is wholly unsustainable. The current position in law is that non-compliance with Shariah principles does not render a financing facility contract illegal and

I unenforceable unless it is vitiated by the vitiating factors as stipulated in s 24 of the Contracts Act 1950 as held by the Court of Appeal in *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor* [2017] 2 MLJ 69 The Court of Appeal in *M-IO Builders Sdn Bhd & Anor* had emphasised that the validity of the contract in respect of Islamic financing facility should be viewed from the law that

generally governs the contract between the parties in this country in which the non-compliance with the Shariah principle does not vitiate the contract. It held as follows:

> [30] The English court had also applied English laws to enforce a Murahabah contract in Islamic investment company of the *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV and others* [2002] All ER (D) 171 after hearing evidence from Shariah scholars on the principles of Shariah concerning the nature of a murahabah agreement, the court found that the agreement in dispute did not satisfy the essential requirements of Murabahah, yet found the English law applies and had given effect to the contract based on English law. Similarly in the case of Shamil Bank of *Bahrain EC v Beximco Pharmaceuticals Ltd and others* [2004] 4 All ER 1072, the principles of Shariah in the English case was inserted by virtues of the governing law clause under the agreement. The governing law clause was stated as 'subject to the principles of Glorious Syariah, this agreement shall be governed by and construed in accordance with the laws of England'. We agreed with that approach and in our view the validity of the contract in this case should be viewed from the law that generally governs the contract between parties in this country. This approach would be in consonant with what was stated in the case of *Bank Rakyat v Emcee*. *We are therefore of the view firstly, the provisions of the Contracts Act 1950 still govern Islamic contracts. It follows therefore the MOD facility agreements are not one that can be avoided under s 24 of the Contracts Act nor an illegal contract under s 25 and therefore remains an enforceable agreement and must be adhered to*. (Emphasis added.)

[32] It is pertinent to note that in *M-IO Builders Sdn Bhd & Anor* that the Islamic financing facility in question was a Murabahah overdraft facility. By extension, the principles stated therein would apply to any agreement which is in non-compliance with Shariah principles including Commodity Murabahah.

[33] The courts have consistently taken a disapproving view of customers of Islamic based facilities who have benefited from the facilities taken and then avoid their payment obligations by raising the issue that the Islamic financing facilities granted are non-Shariah compliant, as the plaintiffs are doing in the present case. See *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit* [2011] 3 MLJ 766; [2010] 4 CLJ 388 (HC); *Bank Kerjasama Rakyat (M) Bhd v PSC Naval Dockyard Sdn Bhd* [2007] MLJU 722; [2008] 1 CLJ 784 (HC); *Bank Islam Malaysia Bhd lwn Rhea Zadani Corp Sdn Bhd dan lain-lain* [2012] 10 MLJ 484 (HC). This reflects the current position in law as stated in *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor*.

Ta'widh

[34] On the issue of imposition of late payment charges as the plaintiffs pleaded in paras 21–25 of the statement of claim, the plaintiffs' contention is

that the late payment charge (*ta'widh*) imposed by the defendant is in conflict with the guidelines issued by Bank Negara Malaysia. This was further averred to in para 10 of the plaintiffs' affidavit in reply.

[35] *Ta'widh* may be charged by Islamic Financial Institutions ('IFIs') at a different rate before and after the maturity of the Islamic financial product where the rates are charged successively and not concurrently. The late payment charge (*ta'widh*) at 1%pa on all overdue instalments before the maturity and at the IIMM rate on the outstanding balance after the maturity of the CM-i facility imposed by the defendant was in compliance with the guidelines issued by Bank Negara Malaysia. This can be seen in Bank Negara Malaysia's Guidelines on late payment charges for IFIs (BNM/RH/GL 012–6) ('the guidelines') at para 5.2.2.A which is summarised as follows:

(a) all IFIs are allowed to be compensated by way of *ta'widh* up to (or equivalent to) the actual amount of losses incurred by the IFIs from any default payment, which shall not be more than 1%pa on the overdue instalments of the Islamic financial product until the full settlement or maturity thereof, whichever is earlier; and

(b) after the maturity of the Islamic financial product, the actual loss is to be compensated by way of *ta'widh* which shall not be more than the prevailing daily overnight IIMM rate on the outstanding balance (outstanding principal and accrued profit) of the Islamic financial product.

[36] The plaintiffs' action against the defendant on the basis that the late payment charge (*ta'widh*) imposed by the defendant is in conflict with the guidelines issued by Bank Negara Malaysia is therefore unsustainable.

Ibra' (rebate)

[37] The plaintiffs pleaded that they suffered loss due to the negligence and/or failure of the defendant in failing to apply *Ibra'* (rebate) upon termination of the CM-i facility. See paras 56–59 and para 83 of the statement of claim.

[38] This is a contention without basis as it is clearly stated in the letter of offer executed between the defendant and the first plaintiff that *Ibra'* shall only be granted if the first plaintiff settles or terminates the facility before the end of financing tenure by way of full settlement of the amount due and owing under the facility, which is not the case here. See para 13(d) of the Al-Amin product terms of the facility which is part of the letter of offer.

[39] The courts have consistently held that a financier bank has no

obligation to give *Ibra'* where there is no early settlement of the financing.

[40] In *Maybank Islamic Bhd v Kamarulzaman bin Mohamed Nordin* [2014] 7 MLJ 685 the High Court held that the facility provider is entitled to claim the whole outstanding amount including unearned profit or *Ibra'* in the event of default on the part of the defendant to settle the outstanding under the facility. The court stated:

> Was the plaintiff entitled to unearned profit
>
> [36] The plaintiff was entitled to claim the whole outstanding amount including 'un-earned profit' in event of default on the part of the defendant to settle the outstanding under the BBA (see *Islamic Banking Practice: From the Practitioners Perspective, Bank Islam Malaysia Berhad, 1994* where the plaintiff as the bank which provided the housing financing shall be entitled to claim the whole sum granted to the defendant plus profits, (see *Bank Islam Malaysia Bhd v Adnan Bin Omar* [1994] MLJU 221; [1994] 3 CLJ 735).

[41] In *CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor* [2012] 3 MLJ 869; [2011] 7 CLJ 594 it was held that a facility customer was not entitled to *Ibra'* when he has not made early settlement. The court held:

> [37] The SAC in its 95th meeting held on 28 January 2010 had decided that in line with the need to safeguard maslahah (public interest) and to ensure justice to the financiers and customers, Islamic banking institutions are obliged to grant *Ibra'* to customers for early settlement of financing based on buy and sell contracts (such as Bai' Bithaman Ajil or Murabahah). In order to eliminate uncertainties pertaining to customers' rights in receiving *Ibra'* from Islamic banking institutions, the granting of *Ibra'* must be included as a clause in the legal documentation of the financing. The determination of *Ibra'* formula will be standardised by Bank Negara Malaysia (see Resolutions of Shariah Advisory Council of Bank Negara Malaysia on *ta'widh*, Ibra and Late Payment Charge, Islamic Banking and Takaful Department, BNM/RH/NT 008–8, at p 2). The effective date of this resolution is 7 June 2010.
>
> [40] *The crucial word here is 'an early settlement'. Do these words include the early termination by the plaintiff upon default on the part of the defendants*?
>
> [42] On that basis, this court finds that in paras 21 and 22 of the letter of offer, it was agreed that the first defendant shall be given the right to make early settlement on the BBA facility and the plaintiff shall be entitled to grant *Ibra'* and the plaintiffs calculation of *Ibra'* shall be final and binding. It was further agreed that for entitlement of *ibra'* on early settlement basis of the selling price, the first defendant is required to give three days advance notice to the plaintiff, which early settlement must be made on a profit payment date. However, should the notice is less than three days, the plaintiff shall be entitled to grant a lower *Ibra'*.
>
> [43] On the plain reading of the said letter, *the early settlement only refers to a situation when the first defendant makes early payment of the BBA facility before the end of the tenure without compulsion. Unfortunately, it was not the defendants' case as until to date, there is still no effort to settle the outstanding*.

A [44] For the foregoing reasons, the defendants' contention must fail. The plaintiff is under no obligation neither duty to grant an *ibra*' to the defendants. (Emphasis added.)

B **[42]** Further, a judgment can be entered without applying *Ibra*'but unearned profit will be deducted from the judgment sum when settlement is made subsequently as held in *Bank Islam Malaysia Bhd v Azhar bin Osman and other cases* [2010] 9 MLJ 192 (HC).

C **[43]** Therefore, the plaintiffs' case that they suffered due to the negligence or failure of the defendant in failing to apply *Ibra*' upon termination of the CM-i facility is in law plainly unsustainable.

Explanation of the terms of the agreements and the letter of guarantee to the plaintiffs

D

[44] The plaintiffs' basis for saying that the agreements were executed due to the defendant's misrepresentation and fraud is that the defendant had failed to properly explain the terms of the agreements (see paras 60–70 of the statement of claim).

E

[45] The contention of the plaintiffs that the agreements were not properly explained to them runs contrary to what was agreed to by the plaintiffs in the agreements. For the purpose of the CM-i facility and the guarantee under the letter of guarantee, the plaintiffs had warranted to the defendant that:

F

(a) the agreements constitute the entire agreement between the defendant and the first plaintiff and supersede all or any representations by the defendant, its officers or agents (see para 36 of the annexure to the letter of offer);

G

(b) the first plaintiff has sought, obtained and relied upon its own independent legal advice in the execution of the agreements and the defendant had granted the facility on the basis of and in full reliance upon such warranty (see para 37 of the annexure to the letter of offer);

H

(c) the first plaintiff has read and understood the agreements and the obligations thereunder (see para 37 of the annexure to the letter of offer);

(d) the second plaintiff has sought obtained and relied upon its own independent legal advice in the execution of the letter of guarantee and the defendant had accepted the letter of guarantee on the basis of and in full reliance upon such warranty (see para 35 of the letter of guarantee); and

I

(e) the second plaintiff has read and understood the letter of guarantee and the obligations thereunder (see para 35 of the letter of guarantee).

[46] In *Small Medium Enterprise Development Bank Malaysia Berhad v Savvy Valley Sdn Bhd & Ors* (Suit No WA-22M-621–12 of 2018) (unreported) the High Court did not accept the contentions of guarantors that they should be released from the guarantee because of the bank's failure to explain the meaning and implications and the effect of a loan. The court held as follows:

> (e) the contentions that Andy Farouk and Mohamed Ridzuan is released from the guarantee under the guarantee and indemnity agreement because of SME Bank's failure to explain the meaning and implications and the effect of a Murabahah loan is untenable. It is settled law that a person is bound by the terms and conditions of a written document which he signs unless he can prove the existence of fraud or misrepresentation (*L'Estrange v F Graucob, Limited* [1934] 2 KB 394).

[47] Further, the sum of RM300,000 disbursed under the facility was fully utilized by the first plaintiff was never disputed. When part-payments in the total sum of RM282,780.05 were made by the first plaintiff, the plaintiffs did not dispute the validity of the agreements or raise any complaint or protest that the agreements were allegedly non-Shariah compliant. This demonstrates that the plaintiffs clearly understood the terms of the agreements and had voluntarily agreed to be bound it. A party that accepted the terms and conditions stated in a document in writing without dispute is treated to have voluntarily agreed to be bound by those terms and conditions and cannot at a later stage dispute the contents of the documents as held in *Maybank Islamic Bhd v Kamarulzaman bin Mohamed Nordin.* This is what Asmabi Mohamed JC (as she then was) had to say:

> (1) The defendant had disputed the sale price after 16 years. The defendant who had signed the relevant documents had accepted the terms and conditions and could not, at a later stage, dispute the contents of the documents. The parties have voluntarily agreed to be bound by the terms and conditions of specific agreements and the defendant had also agreed to be bound by some mechanism and process to give effect to the ultimate intention of the parties. The defendant had only paid nine monthly instalments and defaulted in his monthly instalment for eleven months and a notice had been issued. The defendant had breached section 2.01 of the SACA, in that, he had failed to perform his obligation under the contract to ensure all instalment payments under the SACA were promptly made (see paras 20 & 24).

[48] Therefore, the plaintiffs' cause of action in misrepresentation and fraud founded on the contention that the agreements and the letter of guarantee were not properly explained to the plaintiffs is bound to fail.

Res judicata

[49] In any event, judicial estoppel operates against the plaintiffs in respect of the plaintiffs' action for the order as prayed for in para 95(a) of the statement of claim which is an order declaring that the letter of offer, asset sale agreement

and letter of guarantee and all agreements between the plaintiffs and the defendant are invalid and void and shall not be enforceable against the plaintiffs.

[50] The issues raised by the plaintiffs in seeking the order are:

(a) the agreements and the facility granted pursuant thereto were void for being non-Shariah compliant;

(b) the late payment charge (*ta'widh*) imposed by the defendant is in conflict with the guidelines issued by Bank Negara Malaysia;

(c) the defendant was negligent and/or failed to apply *Ibra'* upon termination of the facility;

(d) the terms of the agreements and the letter of guarantee were not properly explained to the plaintiffs; and

(e) the plaintiffs were misrepresented as to the terms of the agreements and the letter of guarantee.

[51] The plaintiff could have but did not raise these issues in the sessions court suit by the defendant against the plaintiffs and the two other guarantors in defending the suit against them. The plaintiffs, as defendants in the sessions court suit who were represented by solicitors, could have pleaded these issues in their defence or raised these issues by way of affidavit evidence in the defendant's session court O 18 application but they did not. These issues would have been within the plaintiffs' knowledge when the sessions court suit was filed against them. The plaintiffs had the opportunity to raise all the issues therein but had failed to do so. I find no explanation offered in the plaintiffs' affidavit on their failure to raise these issues in the sessions court suit.

[52] The doctrine of res judicata applies to such facts and issues which might have been and which were not brought forward as described, though not actually decided by the court. See *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd*.

[53] The plaintiffs are raising the same issues which would have and should have been ventilated in the sessions court suit and by raising the same issues before this court, the plaintiffs are attempting to relitigate and amplify the issues again. Such an attempt is an abuse of the process of the court. For this reason the plaintiffs' action for the order as prayed for in para 95(a) of the statement of claim must be struck out.

[54] The case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* does not assist the plaintiffs. The plaintiffs relied on this case for

the proposition that this court has the inherent power to set aside the judgment in default obtained by the defendant in the sessions court. This case is to be distinguished from the present case. In *Badiaddin* the impugned order from another High Court that was challenged contravened the Malay Reservations Enactment. In the present case, the judgment in the sessions court suit was not null and void due to illegality of lack of jurisdiction and was entered well within the jurisdiction of the sessions court.

[55] In *Ann Joo Steel Berhad v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* the Federal Court answered in the affirmative to the question whether the question of whether a party seeking to collaterally attack or challenge a sealed and perfected court order is required to take an active step in filing an application either in the same proceedings or in separate proceedings brought for that purpose to set aside the court order, in circumstances where that party failed to appeal. This was relied on by the plaintiffs for the proposition that an order can be collaterally attacked or challenged even if there is no appeal. However, in *Ann Joo Steel* the purpose of the collateral attack in the later High Court action was on the ground that the earlier order in another High Court action was made in excess of jurisdiction. Again, this is not the case here. The plaintiffs have never shown that the sessions court in entering the judgment was acting in excess of its jurisdiction.

The first plaintiffs' ownership of the commodity and constructive trust

[56] The plaintiffs' case based on paras 72–82 and paras 90–91 of the statement of claim is that the first plaintiff is still the owner of the commodity transacted under the Shariah Principle of Commodity Murabahah as the defendant sold the commodity to a third party without the consent of the first plaintiff. Thus, according to the plaintiffs the defendant shall hold the proceeds from the sale of the commodity on constructive trust for the first plaintiff. This forms the purported basis for the plaintiffs' prayers stated in para 95(b) and para 95(c) of the statement of claim.

[57] I observe here first that although it was averred in the plaintiffs' affidavit in reply that their solicitor on their behalf issued a letter dated 27 May 2020 to the defendant requesting for particulars of the commodity, no such letter was exhibited by the plaintiffs. In the absence of the document, the court is unable to consider whether the plaintiffs' position that the defendant ignored the request by the first plaintiff for the particulars of the commodity is correct or whether the the plaintiffs' action in not responding to the first plaintiff's request was reasonable.

[58] In any event, the court finds that the basis of the plaintiffs' contention here is misconceived and without merit. From the affidavit evidence it is clear that the following had transpired:

(a) the defendant, upon the first plaintiff's promise or agreement to purchase the commodity from the defendant, purchased the commodity from the market at costs of RM300,000. A certificate bearing CP010MAR2016–00043–000 certifying the subject transaction and four other transactions made by the defendant for four other customers in the total volume of 517.58699 tonnage with a total value of RM1,368,500 ('the transactions') was issued by Bursa Malaysia Islamic Services on 10 March 2016 at 10:07:30. This was in accordance with para 1(a)(i) of the Al-Amin product terms;

(b) the defendant then sold the commodity at costs plus profit to the first plaintiff at the defendant's sale price of RM405,000 which was payable on deferred payment terms. A certificate bearing CP010MAR2016–00043–000 certifying the transactions was issued by Bursa Malaysia Islamic Services on 10 March 2016 at 10:16:30 also in accordance with para 1(a)(i) of the Al-Amin product terms; and

(c) the first plaintiff did not request for the delivery of the commodity but as the first plaintiff had already appointed the defendant as its agent and authorised the defendant to sell the commodity on its behalf in the market at the customer's (the first plaintiff) sale price of RM300,000 on cash terms, the defendant as agent of the first plaintiff sold the commodity at the customer's sale price of RM300,000 and a certificate bearing CP010MAR2016–00043–000 certifying the transactions was issued by Bursa Malaysia Islamic Services on 10 March 2016 at 10:23:55. This was in accordance with para 1(a)(i) of the Al-Amin product terms.

[59] The CM-i facility of RM300,000 granted by the defendant to the first plaintiff in the aforesaid manner was disbursed to and received by the first plaintiff on 10 March 2016. Therefore the first plaintiff is liable to pay the defendant's sale price of RM405,000 on deferred payment terms and subject to all other terms as provided in the agreements.

[60] Any allegation that the commodity was sold to a third party without the consent of the first plaintiff, which formed the basis of the plaintiffs' further contention that the price of the commodity was never reported and not paid to the plaintiffs and not credited back into the first plaintiff's account amounting to fraudulent actions or stealing by the defendant is without merit. The appointment of the defendant as the first plaintiff's agent to sell the commodity in the market at the customer's sale price on cash terms to execute all transactions for and behalf of the customer pursuant to para 1(a)(i) of the

Al-Amin product terms was to facilitate the transaction so as to be compliant with the Shariah requirements of the commodity Murabahah transaction. It was observed by Rohana Yusuf J (as she then was), delivering the judgment of the High Court, in *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit* that the demand on a person to fulfil contractual obligations in Shariah is an onerous one and challenges on the validity of an agreement of Islamic financing transactions after reaping the benefit is considered to be an attempt to renege on contractual obligations which have been voluntarily agreed and acted upon. Her Ladyship said this:

> [13] The issue before me is therefore whether the challenge on the validity of the BBA facility agreement is a bona fide triable issue. In my view, questioning of the validity of an agreement after benefiting from it and upon default, in itself lacks bona fide. I say this because Tan Sri Khalid was in the position to obtain any Syariah or legal advice at the time he entered into these agreements with the bank. To turn around and challenge the validity of an agreement entered voluntarily after reaping the benefit under it appears to be a mere afterthought. This is also akin to a case of a Muslim who goes into a restaurant, had a meal, only to inguire after the meal if the food is non halal and when told that is so, refuses to pay for it. Such conduct cannot reflect a serious concern of the Syariah compliance but more of an attempt to renege contractual obligations which have been voluntarily agreed and acted upon by the other party.

[61] Her Ladyship went on to state:

> [22] Whilst counsel for the Tan Sri Khalid argued that there is a whole host of Syariah rule that must be complied with in this transaction, it must be pointed out that there is another side to fulfilling contractual obligations in the eyes of the Syariah. The demand on a person to fulfil contractual obligations in Syariah is an onerous one. I have in an earlier decision in *Bank Kerjasama Rakyat (M) Bhd v PSC Naval Dockyard Sdn Bhd* [2007] MLJU 722; [2008] 1 CLJ 784 (HC) made my observation on sanctity of contract and the demand on performance of a contractual obligations in the eyes of Syariah. I do not now wish to repeat them here.

[62] Also in *Dato' Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1998] 3 MLJ 393; [1998] 3 CLJ 605 (CA), the court did not concern itself with the intention of the parties to involve any transfer of proprietorship of the asset which was the basis of the Islamic financing transaction as what was important was the execution of the relevant property purchase agreement and the property sale agreement which constituted part of the process required by the Islamic banking procedure before a party could avail itself of the financial facilities provided by the customer.

[63] The plaintiffs' case on the basis that the first plaintiff is still the owner of the commodity transacted under the Shariah Principle of Commodity Murabahah and that the defendant shall hold the proceeds from the sale of the

commodity on constructive trust for the first plaintiff is baseless and is bound to fail. The plaintiffs' action for the orders as prayed stated in paras 95(b) and 95(c) of the statement of claim ought to be struck off for being scandalous, frivolous and vexatious.

Fraudulent judgment

[64] The plaintiffs prayed for the the judgment by the sessions court in Kuala Lumpur in the sessions court suit to be struck off and set aside against the plaintiffs. See para 95(d) of the statement of claim. This is pursuant to the plaintiffs' contention as pleaded in paras 84–86 and 87(a)–(e) of the statement of claim that the sessions court judgment was wrongly, dishonestly and/or fraudulently obtained by the defendant as the defendant had claimed for a sum of RM159,192.84 when the statement of account produced by the defendant showed that the amount owing by the plaintiffs was only RM132,838.70 and the defendant obtained the judgment against the plaintiffs for a sum of RM159,192.84 while obtaining the summary judgment against the two other guarantors for a lower sum of RM132,838.70. This is in addition to the *Ibra*' and the constructive trust issues (see paras 87(e)–(j) and paras 90–91 of the statement of claim). I had addressed earlier and found there to be no merit in respect thereof.

[65] I find the plaintiffs' case based on these contentions to be baseless and consequently the plaintiffs' action for the judgment to be set aside is bound to fail. This is for the following reasons:

(a) the writ of summons against the plaintiffs and the two other guarantors was filed on 22 July 2019. As at 30 June 2019, the amount due and owing to the defendant was RM159,192.84;

(b) the sessions court O 18 application by the defendant to strike out the defence filed by the plaintiffs in the sessions court and the defendant's O 14 application to enter a summary judgment against the two other guarantors were filed on 21 October 2019 in the sessions court;

(c) the amount claimed by the defendant in the O 14 application was reduced to RM132,838.70 as at 10 October 2019 after taking into account of the part payment received by the defendant on 19 August 2019;

(d) the defence filed by the plaintiffs under sessions court suit was struck out on the ground that it was filed out of time, ie two weeks after the time limited for filing, contrary to the directions given by the sessions court and/or the provisions of the Rules of Court 2012;

(e) the plaintiffs failed to file any affidavit in reply to the sessions court O 18 application;

(f) notwithstanding the fact that the plaintiffs were represented by their solicitors in the sessions court suit, the plaintiffs chose not to defend and/or attend the hearing of the sessions court O 18 application;

(g) both the sessions court O 18 application and O 14 application were allowed by the sessions court on 17 December 2019;

(h) the consequence of this is that the amount recorded in the sessions court Judgment against the plaintiffs was RM159,192.84 as at 30 June 2019 (as per the amount endorsed in the writ of summons) while the amount recorded in the summary judgment against the two other guarantors as at 10 October 2019 was RM132,838.70 (as per the amount prayed for in the O 14 application); and

(i) it was stated in the defendant's affidavit in support of the sessions court O 18 application that the amount due and owing by the plaintiffs to the defendant as at 10 October 2019 was RM132,838.70.

[66] Based on what has transpired in the proceedings in the sessions court suit there is no confusion and/or intention to conceal any information as otherwise alleged by the plaintiffs.

[67] In the plaintiffs' submissions the plaintiffs also submitted that the sessions court had failed to refer to ss 56 and 57 of the CBMA 2009 in making the decision to allow the judgment in default being entered against the plaintiffs in the sessions court suit. This issue was never raised in the pleadings nor was it raised in the plaintiffs' affidavit. The court ought to disregard this as the plaintiffs should not submit by way of submission on a point not raised in an affidavit or pleadings as this does not meet the requirements of procedural fairness, following *Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor* [2007] 2 MLJ 221 (CA); *TSC Education Sdn Bhd v Kolej Yayasan Pelajaran Mara & Anor* [2002] 5 MLJ 577 and *Yeoh Theam Poh & Anor v Bench Win Sdn Bhd & Anor and other suits* [2013] 8 MLJ 109.

[68] In any event the court finds the submission of the plaintiffs that the learned sessions court judge had failed to refer to ss 56 and 57 of the CBMA 2009 in making the decision to allow judgment being entered against the plaintiffs in the sessions court suit wholly misconceived.

[69] Section 56 of the CBMA 2009 provides as follows:

> 56 Reference to Shariah Advisory Council for ruling from court or arbitrator
>
> (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall:

A (a) take into consideration any published rulings of the Shariah Advisory Council; or

(b) refer such question to the Shariah Advisory Council for its ruling.

B **[70]** No question concerning a Shariah matter arose in the sessions court suit because the plaintiffs simply let it go undefended. There was thus no obligation for the sessions court to make any reference to the Shariah Advisory Council. Further, a reference to the Shariah Advisory Council is not mandatory and is only made if there are no published rulings of the Shariah Advisory Council C relating to the question that arises. The plaintiffs have not shown this to be the case here. Accepting the plaintiffs' submission is tantamount to holding that for all disputes relating to Islamic financial Business including these proceedings before this court, the court must first refer questions to the Shariah Advisory Council for its ruling, even in undefended cases. This is certainly not D the correct legal position and the process of justice in this court will grind to a halt if that were the position.

[71] It is also relevant that as the plaintiffs had failed to file any appeal against the sessions court judgment. Thus, they are estopped from relitigating any E matter connected therewith by filing this action.

[72] It is clear to me that the plaintiffs' action for the judgment in the sessions court suit to be struck off and set aside against the plaintiffs in these F proceedings rather than apply to set aside the sessions court judgment in the sessions court is barred by res judicata and is a patent abuse of the process of the court which ought to be struck out.

DECISION

G

[73] Considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, it was quite clear to me that the plaintiffs' claim is obviously unsustainable due to it being scandalous, frivolous or vexatious and an abuse of the process of the court. The defendant had clearly H met the requirements in an O 18 r 19 of the ROC 2012 application in accordance with the principles established by *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd*.

I **[74]** Accordingly I allowed encl 8 with costs of RM5,000 subject to the allocatur.

Enclosure 8 allowed with costs of RM5,000.

Reported by Nabilah Syahida Abdullah Salleh